

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

In the Matter of)

Applications for Consent to the)
Transfer of Control of Licenses)

General Electric Company,)
Transferor,)

to)

Comcast Corporation,)
Transferee)
_____)

MB Docket No. 10-56

FILED/ACCEPTED

JUN 21 2010

Federal Communications Commission
Office of the Secretary

REDACTED - FOR PUBLIC INSPECTION

**HIGHLY CONFIDENTIAL SUPPLEMENT TO THE PETITION TO DENY OF
DISH NETWORK L.L.C AND ECHOSTAR CORPORATION
VERTICAL FORECLOSURE THREATS POSED BY THE PROPOSED COMCAST-
NBC TRANSACTION**

I. INTRODUCTION AND SUMMARY

Counsel for DISH Network L.L.C. ("DISH") and EchoStar Corporation ("EchoStar") file this supplement to the Petition to Deny filed by DISH and EchoStar today.¹ The purpose of this supplemental submission is to respond to the conclusion reached by the Applicants' economists that the proposed combination of Comcast Corporation and NBC Universal, Inc. ("NBCU") does not pose a significant threat that Comcast will foreclose other Multi-Channel Video

¹ This supplement cites to and contains Highly Confidential information either previously submitted or previously approved under the *Second Protective Order* in this proceeding. A redacted version of this supplement for public inspection is simultaneously being filed with the Commission.

No. of Copies rec'd. 0
List ABCDE

REDACTED - FOR PUBLIC INSPECTION

Programming Distributors (“MVPD”s) from NBCU’s owned and operated NBC network stations.²

To reach that conclusion, Comcast’s economists apply the Commission’s foreclosure model after making what they describe as “appropriate modifications” to it.³ The purpose of the exercise is to assess whether foreclosing Comcast’s competitors from NBC programming would be profitable. To do this, they compute the “critical departure rates” of subscribers leaving a competitor – *i.e.*, the minimum number of departures that must be met for foreclosure to be profitable.⁴ Those critical rates then become the yardstick against which Comcast’s economists compare “likely actual” departure rates.⁵ They in turn estimate these rates from a number of historical foreclosure incidents, including most prominently DISH’s temporary loss, over a period of six months, of the network stations belonging to Fisher Broadcasting Company.⁶

The conclusion Comcast draws from this comparison is carefully hedged to begin with:

Although the confidence intervals around these results are large enough that they do not ‘prove’ that the actual departure rates are below the low-end of some of our estimated ranges for the critical departure rates, these results provide strong evidence that – even during a six-month retransmission dispute – actual departure rates were below the critical departure rate required to support profitable foreclosure. Put simply, the empirical evidence provides no support for a claim that the post-transaction NBCU would have an incentive to withhold NBC from any rival MVPD in any DMA.⁷

² Mark Israel and Michael L. Katz, Application of the Commission Staff Model of Vertical Foreclosure to the Proposed Comcast-NBCU Transaction, MB Docket No. 10-56, at 81 ¶ 132 (Feb. 26, 2010) (“Israel/Katz Report”).

³ *Id.* at 4 ¶ 5.

⁴ *Id.* at 43 ¶ 73.

⁵ *Id.* at 78 ¶ 125.



⁷ *Id.* at 79-80 ¶¶ 129.

REDACTED - FOR PUBLIC INSPECTION

In fact, a review of the Comcast economists' work does not support even this highly qualified conclusion. The critical departure rates (the bar beyond which foreclosure becomes profitable) are lower than they calculate. This is because many of the "appropriate modifications" they make to the Commission model are not in fact appropriate.⁸ And, DISH's actual experience in the Fisher incident shows the historical departure rates resulting from network station foreclosures to be much higher than Comcast's economists argue based on indirect inferences.⁹

II. THE PHILADELPHIA PRECEDENT

To begin with, the suggestion that Comcast would not foreclose competitors from its new programming assets is belied by Comcast's practice with respect to the programming assets that it does control now. Comcast would not have denied DISH and DIRECTV access to its Philadelphia sports programming had it not thought that the strategy would pay. DISH's experience shows that the Philadelphia foreclosure has indeed paid richly for Comcast. [REDACTED]

[REDACTED] For more than a decade Comcast has found it profitable to forego not only the advertising revenues that would result from its sports channel being available on DBS, but also the very significant subscription revenue for the channel. It has foregone these revenues for the obvious reason they are more than offset by the additional revenues it receives from subscribers signing on with Comcast rather than DBS because the sports channel is only available on Comcast.

⁸ See *id.* at 4 ¶ 5. Comcast's economists seem to admit that the Commission's model, applied without the "modifications," would "substantial[ly] increase the probability that the transaction would cause anticompetitive foreclosure. *Id.* at 3 ¶ 3.

REDACTED - FOR PUBLIC INSPECTION

Importantly, there are at least two differences between NBC and the Philadelphia sports programming suggesting that, if anything, foreclosure would be even more profitable here. First, in Philadelphia Comcast had all of the upside but also all of the downside (as the sole owner of the sports programming). With respect to NBC, Comcast will still have all of the upside, while having just over half of the downside.¹⁰

Second, the per subscriber fees that Comcast has foregone by denying access to regional sports programming are much higher than the retransmission fees it would forego if it were to deny retransmission rights to NBC. Specifically, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] which will be discussed below, the RSN foreclosure is more costly for Comcast than the NBC foreclosure would be. And if the more costly course of action is nevertheless profitable, a cheaper strategy will be more profitable still – a proverbial “no-brainer,” unless checked by meaningful conditions.

III. THE ECONOMICS RELATED TO COMCAST’S PARTIAL OWNERSHIP OF NBCU

Comcast’s economists do not give due weight to the disparity of Comcast’s economic participation in the distribution and programming links of the vertical chain,¹² which means that

¹⁰ Amended and Restated Limited Liability Company Agreement of Navy, LLC § 8.02, MB Docket No. 10-56 (filed Jan. 28, 2010) (“Comcast-GE NBC Operating Agreement”) (providing a 51 percent distribution to Comcast and 49 percent to GE).

[REDACTED]

[REDACTED]

REDACTED - FOR PUBLIC INSPECTION

Comcast has all the upside and only half of the downside of a foreclosure strategy. Instead, rather remarkably, they seek to reverse the true implications of that fact and to parlay it into a safeguard that makes foreclosure *more* unlikely. According to them, “[o]ne critical factor is the presence of GE as an owner of NBCU following completion of the proposed transaction. GE will have contractual rights that it can invoke to protect in ensuring its commercial self-interest does not participate in a foreclosure strategy that harms NBCU while helping Comcast’s cable systems.”¹³ But the economists do not cite any provisions of the agreement between the applicants that would give GE, as the minority shareholder of the NBCU joint venture, the veto rights necessary to forestall a foreclosure strategy. In fact, not only does the agreement omit such veto rights. Rather atypically, it also only includes very limited minority investor protections.¹⁴ And, of course, there is no disputing that Comcast will control NBCU, both *de jure* and *de facto*.¹⁵

In the absence of general veto rights, Comcast’s economists rely exclusively on the fiduciary duty of Comcast managers to GE. DISH does not dispute that fiduciary duty can play a relevant part in such matters. Standing alone, however, fiduciary duty is an inadequate safeguard to prevent anticompetitive behavior. This is precisely the reason why minority shareholders seek

¹³ *Id.* at 6 ¶ 10.

¹⁴ Comcast-GE NBC Operating Agreement § 4.10(a). These rights are limited to (i) certain acquisitions, (ii) material expansions of Newco’s scope of business or purpose, (iii) certain issuances or repurchases of equity, (iv) certain distributions to equity holders, (v) certain debt incurrences, (vi) certain loans made outside of the ordinary course of business, and (vii) a liquidation or voluntary bankruptcy of Newco.

¹⁵ See Applications for Consent to the Transfer of Control of License, General Electric Company to Comcast Corporation, Applications and Public Interest Statement, MB Docket No. 10-56, at 11-16 (filed Jan. 28, 2010).

REDACTED - FOR PUBLIC INSPECTION

veto rights – because the fiduciary duty of the managers does not ensure adequate protection. And ultimately, a non-controlling view from a minority shareholder can hardly match the restraint on Comcast's behavior that would be present if Comcast had itself all of the foreclosure's downside (*i.e.* if Comcast owned all of NBCU). If even that restraint is insufficient, as it was in the case of Philadelphia, GE's voice will be, if anything, more ineffective still.

This is all the more so because, while foreclosure is all upside for the distribution arm, it is in fact *not* all downside for the programming arm. Foreclosure doubtless has immediate costs for NBC, but it also has potential benefits: the "strong-arming" may result in NBC commanding larger fees either from the distributor that is the victim of foreclosure or from other distributors who fear the same retribution. While Comcast's economists include foregone retransmission fees on the negative side of the ledger,¹⁶ as a cost of foreclosure, they appear to ignore the fact that foreclosure is also a technique for achieving higher fees later. If the benefit of eventual higher fees exceeds the temporary foregone fees, the minority shareholder might support the strategy enthusiastically in the first place, mooted the effect of fiduciary duty for yet one more reason.

But in any event, it is unrealistic to assume, as Comcast's economists do, that Comcast will behave as if it owns 100% of NBC even if it will own about 50%. It is true, of course, that Comcast can become sole owner of the joint venture in the future, after consummation of the initial transaction. But if and when that happens, foreclosure may already have been attempted, and its harm may already have been done irreparably.

IV. NBC RETRANSMISSION CONSENT FEES

¹⁶ Israel/Katz Report at 38 ¶ 66.

REDACTED - FOR PUBLIC INSPECTION

Beyond this threshold issue, many of the modifications that Comcast's economists make to the assumptions underlying the model seem seriously flawed. Perhaps most important among them is the [REDACTED] in the level of NBC retransmission fees.¹⁷ These, of course, are the fees that would be lost by NBC in a foreclosure strategy. This means that, the higher the foregone fees are, the less profitable foreclosure would be for Comcast.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Backing this adjustment alone out of the calculations of Comcast's economists would significantly reduce the critical departure rates by showing foreclosure to be less costly.

Furthermore, to deal with the "fact" of staggered retransmission contracts, Comcast's economists assume that "the diversion ratio to each of the remaining, non-foreclosed MVPDs in the DMA would be proportional to the MVPD's share of all MVPD subscribers in that DMA."²⁰ In other words, Comcast's analysis discounts Comcast's benefit from the foreclosure by

[REDACTED]

[REDACTED]

[REDACTED]

²⁰ Israel/Katz Report at 27-32 ¶¶ 49-55.

assuming that all but one of the other MVPDs would *not* be foreclosed. But again, this assumption does not appear to correspond to the facts. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

V. OTHER FLAWED OR OVERLY-OPTIMISTIC ASSUMPTIONS

In the same vein, the Comcast analysis further discounts the benefits to flow to Comcast by assuming that, in each DMA that has a telco MVPD, “the telco MVPD realizes the maximum share that any telco MVPD has achieved in a DMA to date [REDACTED] Here again, instead of being conservative, Comcast’s economists seem unrealistically aggressive – they assume that all telco MVPDs will soon attain in each DMA where they operate the maximum penetration that any one of them has ever reached in any one DMA, however aberrant and unique this maximum share may be. This is one more significant way in which Comcast’s analysis inappropriately discounts the benefits of foreclosure to Comcast.

As another example, Comcast’s economists assume that other MVPDs can manipulate long-term subscriber contracts “to limit any subscriber losses that might result from loss of the NBC broadcast signal.”²³ In other words, DISH could defend itself by refraining from entering into subscriber contracts that expire at around the same time as its retransmission contract with NBC. But of course, DISH offers contracts to its subscribers on a rolling basis, as customers

[REDACTED]

[REDACTED]

²³ *Id.* at 34 ¶ 59.

REDACTED - FOR PUBLIC INSPECTION

knock on its door. To do what Comcast assumes, DISH would likely have to close its doors and declare a moratorium on accepting new subscribers at certain times, so that the expiration dates of its subscriber agreements do not coincide with the expiration date of the NBC contract. The thought that such a defense mechanism can be engineered in real life is implausible.

VI. THE FISHER INCIDENT

Comcast's calculation of critical departure rates rests on many other questionable assumptions on which DISH will not dwell here. It is with respect to the second prong of the study – the estimation of likely actual rates – that collides most sharply with DISH's own experience. Comcast's economists estimate that the Fisher incident did not cost DISH [REDACTED]

[REDACTED] Comcast's economists arrive at these conclusions by inferring DISH's subscriber base changes from the changes to Comcast's base in these regions of the Fisher DMAs where Comcast had a presence, and comparing them in turn against changes to Comcast's subscriber base in "the closest unaffected region" where Comcast has a presence.²⁶

There are many issues with this method. For one thing, Comcast's choice of the Fresno and Sacramento DMAs for comparison to the Fisher DMAs appears arbitrary. Among other reasons, Comcast has a different footprint in the Fresno and Sacramento DMAs, accounting for over 75 percent of all cable passed households in those two DMAs but under 70 percent in the Fisher DMAs. What is more, neither the Fresno DMA nor the Sacramento DMA is comparable

[REDACTED]
[REDACTED]
²⁶ *Id.* at 61-62 ¶¶ 100.

REDACTED - FOR PUBLIC INSPECTION

is population to any of the Fisher DMAs. More generally, and perhaps most important, Comcast's economists do not cite any similarity between the Fisher DMAs and their choices of control DMA beyond geographic proximity, which appears to be an arbitrary criterion, standing alone.

Second, even accepting for a moment the method's soundness, it yields results that Comcast is hard-pressed to explain. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

But most important, DISH has already submitted for the record of this proceeding the Declaration of Vincent Kunz, which describes the effect of the Fisher loss on DISH's market share and churn, and estimates the subscribers that DISH lost on account of the temporary Fisher foreclosure. Among other things, Mr. Kunz concludes that: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

REDACTED - FOR PUBLIC INSPECTION

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

These conclusions rest on directly observable evidence and are therefore more reliable than the indirect inferences drawn by Comcast from Comcast's own subscriber base.

VII. CONCLUSION

Unless properly conditioned, the transaction poses serious vertical foreclosure risks that would harm competition among MVPDs.

Respectfully submitted,

/s/ _____
Pantelis Michalopoulos
Christopher R. Bjornson
Steptoe & Johnson LLP
1330 Connecticut Avenue N.W.
Washington, D.C. 20036
(202) 429-3000
*Counsel for DISH Network L.L.C. and
EchoStar Corporation*

June 21, 2010

[REDACTED]

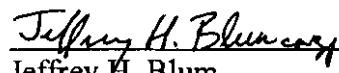
[REDACTED]

REDACTED - FOR PUBLIC INSPECTION

DECLARATION

I declare under penalty of perjury that the facts contained within the foregoing, except for those facts for which official notice may be taken and those that other parties have submitted to the Federal Communications Commission confidentially under the protection of the *Protective Orders* in MB Docket No. 10-56, are true and correct to the best of my information, knowledge and belief.

Executed on June 21, 2010.



Jeffrey H. Blum
Senior Vice President & Deputy General
Counsel

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

**Comcast Corporation,
Transferee**

[illegible]

Federal Communications Commission
Office of the Secretary

June 21, 2010

REDACTED – FOR PUBLIC INSPECTION

SUMMARY

This transaction poses grave threats to the continued expansion and vibrancy of what is arguably the most important development in video markets today – online video – as well as to the competitiveness of the multi-channel video distribution market. The proposed merger of Comcast and NBCU is a troubling vertical integration of a long-standing distributor and a traditional content provider. But in addition, and contrary to the assertions of the Applicants, it is a horizontal combination of two leading providers of a new product altogether – online video – who together would reduce competition, particularly from an industry that has driven competition in video and related markets for over a decade: Direct Broadcast Satellite (“DBS”).

An essential question raised by the transaction is its implications for the availability of online video, meaning either (a) video that has been delivered via a broadband platform, such as a video-on-demand movie delivered to a set-top box over a broadband connection, or (b) a streamed or downloaded video product on a fixed or mobile screen, such as a live sporting event viewed on a living room television, personal computer, or handheld device. The DBS industry must provide a seamless product combining the best of traditional, linear video with online video in order to remain competitive, drive innovation and investment, and impel its competitors to do likewise. The combination of Comcast and NBCU poses a direct threat to the DBS industry’s ability to offer a competitive product.

DISH Network and EchoStar offer online video to their subscribers today and are expanding such offerings, as evidenced by DISH On Demand, Sling, Google TV, and DISHOnline. Each such component of the online video experience is critical to maintaining DISH Network’s and EchoStar’s competitiveness, and is dependent on the subscriber’s ability to access from a third-party provider an open, non-discriminatory broadband connection to the Internet.

REDACTED – FOR PUBLIC INSPECTION

The merged Comcast–NBCU would have a greater incentive and ability to discriminate against competitors in the online video and multichannel video programming distribution (“MVPD”) markets than does either company pre-merger. Both Comcast and NBCU are significant market participants in online video today and each has displayed examples of a propensity to leverage its power to thwart competitors. The combination of these major online video providers, however, would give the combined entity a much greater incentive to protect existing and future revenue streams and a significantly heightened ability to reduce competition from the DBS industry and other would-be providers of online video services. A combined Comcast–NBCU would have the incentive and ability to take anticompetitive action against DISH Network’s online video products by giving Comcast unique visibility into Hulu; combining Comcast’s broadband gatekeeper position and NBCU’s key role in video-on-demand; blending Comcast’s broadband traffic management power and NBCU’s online video content; joining Comcast’s and NBCU’s ability to interfere with EchoStar’s “Sling” place-shifting technology; and leveraging the combined companies’ ability to offer a multi-platform advertising product.

The Applicants claim that they do not compete with one another today – that there are separate product markets for linear multichannel video distribution and online content distribution. In documents filed at the Securities and Exchange Commission, however, Comcast has stated that its cable systems face the risk of competition from “online services that offer Internet video streaming, downloading and distribution of movies, television shows, and other video programming” and suggests that it faces direct competition from Hulu, Google, Joost, Amazon.com, and others.

REDACTED – FOR PUBLIC INSPECTION

The threat to future competition posed by the proposed merger of Comcast and NBCU should lead the Commission to reject the proposed transaction or, at the very least, impose strict conditions (listed in the Appendix) that would sufficiently prevent anticompetitive effects in the online video market. The ongoing competitiveness of the DBS industry is at stake.

A combined Comcast–NBCU also would threaten competition in the traditional MVPD market by leveraging the retransmission consent rights of the NBC owned-and-operated stations against Comcast’s MVPD competitors, including DISH. The Commission’s findings and remedial conditions in the News Corp.–Hughes merger are directly applicable here. Just as News Corp. had an incentive to delay or deny retransmission consent agreements for the FOX networks with unaffiliated MVPDs in order to drive subscribers to DIRECTV, a combined Comcast–NBCU would similarly have an incentive to delay or deny retransmission consent agreements between NBC and unaffiliated MVPDs in order to drive subscribers to Comcast. The Commission should impose exactly the same condition here that it did in the News Corp.–Hughes transaction: baseball-style arbitration with a standstill (*i.e.*, neither party may take down programming) for all NBC owned-and-operated stations negotiating retransmission consent with MVPDs.

Finally, a combined Comcast–NBCU would threaten competition in the MVPD market by granting exclusive distribution of NBCU content to Comcast customers or otherwise discriminating against competitors. Some exclusive deals and discriminatory conduct of this nature are already prohibited by the Commission’s program access rules, but these rules are not sufficient and certainly do not preclude creative attempts at circumventing them. Comcast has used its control over “must have” content to reduce competition from its rivals in the past. It takes little imagination to envision how a company that behaves this way with respect to its

REDACTED – FOR PUBLIC INSPECTION

current content holdings will behave after it acquires NBC and other flagship, must-have content. Comcast's ability to discriminate against its competitors will be greatly enhanced, as will its incentive to do so. Comcast–NBCU should not be allowed to deny key programming assets to its distribution competitors. To mitigate these harms, the Commission should apply all program access rules, as well as baseball arbitration, standstill, and “à-la-carte” requirements, to Comcast–NBCU's online video content; prohibit any exclusive content arrangements for any Comcast-affiliated content; clarify what ought to be clear by now – that the program access rules extend to video on demand and interactive programming; and close the “terrestrial loophole” for Comcast–NBCU as a condition in this proceeding by extending the conditions to all programming, no matter how delivered, regardless of the outcome of the Commission's recent rulemaking on that subject.

REDACTED – FOR PUBLIC INSPECTION

TABLE OF CONTENTS

I. COMCAST–NBCU WOULD REDUCE COMPETITION IN THE ONLINE VIDEO MARKET AND UNDERMINE THE DIRECT BROADCAST SATELLITE INDUSTRY'S COMPETITIVENESS.....	- 2 -
A. Direct Broadcast Satellite Relies on an Unfettered Online Video Market to Stay Competitive	- 3 -
B. Direct Broadcast Satellite Must Make All Forms of Online Video Available to Its Subscribers to Stay Competitive.....	- 6 -
C. Comcast and NBCU Each Have Demonstrated the Ability and Propensity to Discriminate and Abuse Their Market Power in the Online Video Market	- 9 -
D. The Merged Comcast–NBC Would Have a Greater Incentive and Ability to Discriminate Against Competitors in the Online Video Market than Does Either Company Pre-merger ..	18 -
E. Applicants' Relevant Product Market Definition Obscures a Key Issue – the DBS Industry's Reliance on Online Video to Remain Competitive	- 23 -
F. The Commission Should Deny the Application or, in the Alternative, Apply Strict Conditions to Preserve the Vibrancy of the Online Video Market and the Competitiveness of the DBS Industry	- 26 -
II. COMCAST–NBCU WOULD THREATEN COMPETITION IN THE MVPD MARKET BY LEVERAGING THE RETRANSMISSION CONSENT RIGHTS OF THE NBC OWNED- AND-OPERATED STATIONS AGAINST COMCAST'S MVPD COMPETITORS	- 29 -
III. COMCAST–NBCU WOULD THREATEN COMPETITION IN THE MVPD MARKET BY GRANTING EXCLUSIVE DISTRIBUTION OF NBCU CONTENT TO COMCAST CUSTOMERS	- 31 -
IV. CONCLUSION	- 33 -
APPENDIX: CONDITIONS TO PROTECT COMPETITION IN THE ONLINE VIDEO MARKET	
DECLARATION OF DAVE SHULL	
DECLARATION OF MARK JACKSON	
DECLARATION OF ROGER J. LYNCH	

REDACTED – FOR PUBLIC INSPECTION

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Applications for Consent to the)	MB Docket No. 10-56
Transfer of Control of Licenses)	
)	
General Electric Company,)	
Transferor,)	
)	
to)	
)	
Comcast Corporation,)	
Transferee)	

PETITION TO DENY OF DISH NETWORK L.L.C. AND ECHOSTAR CORPORATION

DISH Network L.L.C. (“DISH”) and EchoStar Corporation (“EchoStar”) oppose the horizontal consolidation in the online video market and the vertical consolidation in the MVPD market that would result from General Electric Company transferring to Comcast Corporation (“Comcast”) a controlling interest in NBC Universal, Inc. (“NBCU”).¹ The Federal Communications Commission (“Commission”) has a statutory mandate to protect consumers and competition in emerging video markets and prevent future foreclosure of innovative new

¹ See Public Notice, Federal Communications Commission, Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. to Assign and Transfer Control of FCC Licenses, DA 10-457 (rel. Mar. 18, 2010); Applications for Consent to the Transfer of Control of License, General Electric Company to Comcast Corporation, Applications and Public Interest Statement, MB Docket No. 10-56 (filed Jan. 28, 2010) (“Application”). Comcast and General Electric are hereinafter referred to as “Applicants.” DISH is a competitor in the MVPD market with Comcast, a purchaser of content both from NBCU and from Comcast, and a competitor in the online video market with NBCU and Comcast. EchoStar, too, competes in the online video market – among other things, it owns Sling Media. For these and other reasons described herein, both DISH and EchoStar are, therefore, parties in interest under Section 309(d)(1) of the Communications Act. 47 U.S.C. § 309(d)(1).

REDACTED – FOR PUBLIC INSPECTION

communications platforms, such as online video. It should do so in this proceeding. Moreover, the anticompetitive effects in the MVPD market of combining Comcast and NBCU closely resemble those found by the Commission in similar merger proceedings and should lead the Commission to take preventative action here – either by denying the application or imposing strict conditions.

I. COMCAST-NBCU WOULD REDUCE COMPETITION IN THE ONLINE VIDEO MARKET AND UNDERMINE THE DIRECT BROADCAST SATELLITE INDUSTRY'S COMPETITIVENESS

Video distribution no longer occupies discrete silos such as Multichannel Video Programming Distributors (“MVPDs”) or websites offering video clips. The current video marketplace instead is an amalgamation of multiple distribution methods reaching multiple devices. It is rapidly evolving to allow consumers to watch what they want, when they want, where they want over multiple signal paths to a great many devices. Against this backdrop, DISH and EchoStar, as major participants in the Direct Broadcast Satellite (“DBS”) industry, already an engine of competition benefiting millions of American video consumers, must offer a video product that combines traditional, point-to-multipoint linear television with the interactivity and choice afforded by the online experience.

Comcast and NBCU (“Applicants”) attempt to define the relevant product market in this proceeding as two separate, distinct markets – traditional MVPD service, on the one hand, and video available on the Internet, on the other. But their analysis sidesteps an issue of the first importance: the availability to all MVPD competitors of online video, meaning either (a) video that has been delivered via a broadband platform, such as a video-on-demand (“VOD”) movie delivered to a set-top box over a broadband connection, or (b) a streamed or downloaded video product on a fixed or mobile screen, such as a live sporting event viewed on a living room

REDACTED – FOR PUBLIC INSPECTION

television, personal computer, or handheld device.² That is, in addition to functioning as a stand-alone product and possibly as a competitive substitute, online video functions as an indispensable complement to linear video channels. The DBS industry must provide a seamless product combining the best of traditional, linear video with online video in order to remain competitive, drive innovation and investment, and impel its competitors to do likewise. The combination of Comcast and NBCU poses a direct threat to the DBS industry's ability to offer a competitive product.

A. Direct Broadcast Satellite Relies on an Unfettered Online Video Market to Stay Competitive

DISH and EchoStar offer online video to their subscribers today and are expanding such offerings, as evidenced by DISH On Demand, Sling, Google TV, and DISHOnline. Each such component of the online video experience is critical to maintaining DISH's competitiveness and is dependent on the subscriber's ability to access an open, non-discriminatory broadband connection to the Internet. The DBS industry does not have a proprietary, retail consumer broadband product and therefore must rely on third-party high-speed Internet ("HSI") access providers.³

² Given the changes sweeping through the video distribution business, this proceeding may prove to be the first opportunity for the Commission to make a detailed analysis of these matters relating to online video.

³ DISH partners with WildBlue, a leading provider of satellite broadband access to homes and businesses, to offer high-speed Internet access to customers. WildBlue is a two-way satellite service that provides an always-on, high-speed data connection with speeds up to 30-times faster than dial-up. See Press Release, DISH Network, EchoStar Rolls out High-Speed Internet Service (Oct. 19, 2006), *available at* <http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=243331>.

REDACTED – FOR PUBLIC INSPECTION

DISH On Demand. DISH must offer a compelling VOD experience in order to remain competitive, as consumption of VOD content is growing rapidly. DISH On Demand⁴ is a critical offering for DISH as cable, telco-TV, and satellite operators are expanding their on-demand offerings and VOD consumption has increased 38% in two years.⁵ Given DBS' point-to-multipoint architecture and the limited caching ability of the set-top box ("STB"), the DBS industry relies on third-party broadband providers for downloading video files to the STB and providing return-path functionality.⁶ A DISH customer attaches the STB to a broadband connection and, through the user interface on the television screen, selects movies, television shows, or other video content cached on distant servers and delivered to the STB via a broadband connection.⁷ DIRECTV offers VOD using a similar, broadband-dependent architecture.⁸

Sling. Sling Media, a subsidiary of EchoStar, brings the home television experience to the computing and mobile device screens by creating a point-to-point connection between the STB in the home and a computing device anywhere in the world. This "place-shifting" technology depends on an open, unfettered broadband connection to the STB, which in turn allows the subscriber to view her home television on a computer screen, iPhone, or other device;

⁴ See DISH Network, Watch what you want, when you want, <http://www.dish-systems.com/products/ondemand.php> (last visited June 18, 2010) ("Watch the TV shows you want, when you want with DISH Network TV Entertainment On Demand").

⁵ Declaration of Roger J. Lynch ¶ 8 ("Lynch Declaration").

⁶ Declaration of Mark Jackson ¶¶ 7, 13, 25 ("Jackson Declaration").

⁷ *Id.* ¶ 13.

⁸ See What Is DIRECTV On Demand?, http://support.directv.com/app/answers/detail/a_id/1989/related/1 (last visited June 18, 2010) ("DIRECTV on DEMAND video service gives you access to thousands of hit shows and movies-including the latest blockbusters in stunning 1080p HD. The titles you select are downloaded to your DIRECTV Plus® HD DVR and available to watch whenever you want. It's like having a library of the best TV entertainment at your fingertips!").

REDACTED – FOR PUBLIC INSPECTION

change channels; operate the Digital Video Recorder (“DVR”); and otherwise have the home television experience on any portable or stationary broadband-enabled computing device.⁹

Google TV. The Google TV–DISH product, recently developed by the two companies, brings the Internet video and search experience to the home television, creating a seamless, integrated user experience between linear television programming and online video and other content. DISH and Google recently announced the service, the industry’s first integration of multichannel television and rich web media content. With Google TV, DISH subscribers will be able to perform a unified search covering the listings in the program guide, the subscriber’s DVR and the Internet, including by voice using an Android phone, as well as bringing many applications to the TV, such as Pandora and YouTube.¹⁰ As the CEOs of Google and DISH stated at the launch of the new service,

Google TV [will be] an open platform that seamlessly integrates multichannel television with rich web media content . . . [bringing] the full power of the Internet to the television viewing experience [and merging] traditional TV programming with the wide amount of content on the web, allowing viewers unprecedented access, control, and flexibility over all forms of digital content [such as searching] for content across DISH Network, the Internet and their DVRs [and overlaying] online content related to television shows, movies, actors and more; and also hyperlink web content back to multichannel TV.¹¹

⁹ Jackson Declaration ¶¶ 8-9; *see also* Sling Media Whitepaper, *Placeshifting: Set Your TV Free* (April 9, 2010) (“Placeshifted content can be live or recorded (DVR) programming, and can be enjoyed on the home network or away from home over the Internet. Most consumers do both – placeshifting in and around their home where they do not have a TV, as well as away from their home – at work, at a café, or in their hotel room while travelling. Consumers’ TV subscription service and associated content follows them wherever they have an Internet connection.”).

¹⁰ *See* Lynch Declaration ¶¶ 3-4; Jackson Declaration ¶¶ 10-11.

¹¹ *See* Press Release, Google, Inc. & DISH Network, Google and DISH Network Collaborate to Develop Integrated Multichannel TV and Web Platform (May 20, 2010), *available at* http://www.google.com/press/pressrel/20100520_googletv-dishnetwork.html.

REDACTED – FOR PUBLIC INSPECTION

DISH's CEO, Charlie Ergen, noted that his company's "integration of Google TV marks the next evolution in television."¹² The Google TV experience is dependent on an open, unfettered broadband connection to the STB, enabling two-way high-speed access to the Internet.¹³

DISHOnline and Sling.com. Dishonline.com gives DISH subscribers a single destination on the Internet to access network television content; view authenticated cable network content (e.g., a DISH subscriber to Showtime can access Showtime movies and TV shows online); control the DVR (e.g., to record a program from anywhere in the world); and, with Sling technology, watch programs from their TV or DVR online.¹⁴ Sling.com also offers aggregated video content.¹⁵ The subscriber needs to access Dishonline.com and Sling.com over an open, unfettered broadband connection.

B. Direct Broadcast Satellite Must Make All Forms of Online Video Available to Its Subscribers to Stay Competitive

The aforementioned DISH and EchoStar online video experiences mirror a larger, industry-wide trend as online video becomes an integral part of any competitive pay-TV service. Online video is experiencing explosive growth. By the end of 2010, the total number of Internet-connected TVs will reach approximately 10 million, and revenues generated from Internet-connected video service will reach near \$1 billion.¹⁶ Furthermore, "[a]dvanced Internet video (3D and HD) will increase 23-fold between 2009 and 2014 . . . [and] comprise 46 percent of

¹² *Id.*

¹³ Jackson Declaration ¶¶ 10-11.

¹⁴ See Lynch Declaration ¶ 5; Jackson Declaration ¶¶ 5-6.

¹⁵ See Sling Home Page, www.sling.com (last visited June 18, 2010).

¹⁶ See Dianc Mermigas, *The Walmart-Vudu Match Up: An End-Run Around Cable*, BNET, Feb. 23, 2010, <http://industry.bnet.com/media/10006752/walmart-vudu-match-up-is-an-end-run-around-cable/>.

REDACTED – FOR PUBLIC INSPECTION

consumer Internet video traffic.”¹⁷ Pay-TV services continue to evolve at a rapid pace and providers increasingly are integrating their vast offerings of linear channels with online content.¹⁸ Almost 40 percent of “consumer broadband household respondents want a combination of linear TV and on-demand TV,” nearly 75 percent want all of their video content to come from their pay-TV provider, and consumers specifically desire Internet video as a part of their TV offerings.¹⁹

Online video is a “must have” item. As illustrated in Figure 1, below, every major MVPD offers an online video service in addition to linear channels offered over wireline or satellite connections. Although VOD content²⁰ has been available for years, MVPDs also are

¹⁷ See Cisco Systems, *Cisco Visual Networking Index: Forecast and Methodology, 2009-2014* (June 2, 2010), available at http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-481360.pdf.

¹⁸ See, e.g., Nat Worden & Sam Schechner, *Comcast Rolls Out Web-TV Service*, Wall Street Journal, Dec. 16, 2009; Rob Pegoraro, *Verizon Adding Widgets, Web Video to Fios TV*, WashingtonPost.com, July 15, 2009, http://voices.washingtonpost.com/fasterforward/2009/07/verizon_adding_widgets_web_vid.html; see also Nielsen Media Research, *Television Audience 2008* (finding that the average U.S. household received over 130 channels in 2008, up from 61 in 2000).

¹⁹ See Press Release, In-State, Consumers Want the Best of Both Worlds: Pay TV and Over-the-Top Video (Mar. 10, 2010), available at <http://www.instat.com/press.asp?ID=2757&sku=IN1004654CM>.

²⁰ See, e.g., Press Release, Comcast Corp., Comcast Kicks Off the New Year with More Choices Anytime (Dec. 28, 2009), available at <http://www.comcast.com/About/PressRelease/PressReleaseDetail.aspx?PRID=950> (announcing recent enhancements to Comcast’s existing online video service, including new release movies available the same day as DVD release and expanded HD offerings); Press Release, AT&T, AT&T U-verse Expands Video On Demand Library With HD VOD Titles (Sept. 5, 2008), available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26059> (describing enhancements to AT&T U-Verse VOD service to include expanded library of HD movies); Press Release, DIRECTV, DIRECTV On Demand Now Available Nationwide (June 30, 2008), available at <http://dtv.client.shareholder.com/releasedetail.cfm?releaseid=318983>; Press Release, Cablevision, Cablevision Significantly Expands Free Video On Demand Lineup with Programming from Eight Popular Networks (July 7, 2009), available at <http://www.cablevision.com/about/news/article.jsp?d=070709>; Press Release, Suddenlink, Video On Demand to Launch in West Texas (Sept. 18, 2008), available at <http://suddenlinkfyi.com/2008/09/18/video-on-demand-to-launch-in-west->